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**Citation for published version:**

Cornford, A 2014, 'The Architecture of Homicide', *Oxford Journal of Legal Studies*, vol. 34, no. 4, pp. 819-839. <https://doi.org/10.1093/ojls/gqu022>

**Digital Object Identifier (DOI):**

[10.1093/ojls/gqu022](https://doi.org/10.1093/ojls/gqu022)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Oxford Journal of Legal Studies

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## *The Architecture of Homicide*<sup>†</sup>

Andrew Cornford\*

**Abstract:** This article examines Jeremy Horder's proposals for reform of the law of homicide in his book *Homicide and the Politics of Law Reform*. It focuses on Horder's defence of the Law Commission's proposals for a three-tier structure of homicide offences, and the 'moderate constructivist' theory that he relies upon in mounting this defence. Horder's theory, it is argued, fails to provide sound normative foundations for his preferred structure. However, a qualified defence is offered of another of Horder's proposals: to give public opinion research a role in homicide reform. This would help to give substance to the principle of fair labelling in an area of the law where this principle is frequently invoked, but is also uncertain in its implications and force.

### 1. Introduction

We all agree that killing should be criminal, in at least some of its forms. Yet even this qualification reveals the beginnings of substantial disagreement: under what conditions should one be criminally liable for causing another's death? This question turns out to disclose just the first of many potential controversies about the law of homicide. Others include: should there be a single homicide offence, or a range of graded offences? If the latter, how should the various grades be distinguished from one another? What should the resulting offences be called, and what sentences should attach to them? In less controversial areas of the criminal law, questions like these are doubtless liable to seem dull and technical. But in the context of homicide, they are politically and emotionally charged. This raises still further questions. How should we settle the profound conflicts of value that are likely to arise in homicide reform debates? And how should the reform process be conducted?

In *Homicide and the Politics of Law Reform* (hereafter '*HPLR*'), Jeremy Horder tackles these and many other normative questions about the law of homicide. Ostensibly at least,

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<sup>†</sup> A review of J Horder, *Homicide and the Politics of Law Reform* (OUP, Oxford 2012); hereinafter '*HPLR*'.

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the book does not defend any single thesis or view; rather, it consists of largely stand-alone chapters, each addressing a single aspect of homicide law and its reform. The first two chapters investigate the history of homicide reform and homicide offences in the law of England and Wales. The second part of the book then considers the substantive law of homicide. Horder discusses – and mostly defends – the Law Commission’s proposals in its series of reports on homicide in the period leading up to 2007.<sup>1</sup> Topics addressed are the definition of murder; corporate manslaughter by public authorities; ‘unlawful act’ manslaughter; liability for murder in the course of joint criminal ventures; and transferred malice in murder. The book then concludes with a discussion of partial defences to murder, their history, and options for their reform.

Given this diversity of subject matter and lack of an overarching narrative, one might expect *HPLR* to lack thematic coherence. Upon reading the book, however, a unifying theme quickly emerges – a theme that has occupied Horder throughout much of his career. This is the subjectivist theory of criminal liability that dominated English legal scholarship in the latter part of the twentieth century. *HPLR* continues Horder’s attack on the normative principles favoured by adherents of this theory: in particular, their opposition to constructive criminal liability. But it also attacks the subjectivists on a new front. Doubtless inspired by Horder’s own work as a Law Commissioner (including on the latter stages of the homicide project), *HPLR* is as much concerned with the business of law reform as with its substance.<sup>2</sup> Portions of the book thus attack the subjectivists’ more general approach to criminal law reform.

In this article, I examine Horder’s proposals for reform of the law of homicide in light of his broader critique of subjectivism. To give focus to the discussion, I concentrate on the basic structure of homicide offences that he defends: a version of the three-tier structure proposed by the Law Commission. After summarizing this structure (section 2), I evaluate Horder’s proposals and the anti-subjectivist normative approach that informs them (section

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<sup>1</sup> The two reports arising directly from the Commission’s homicide project were *Partial Defences to Murder* (Law Com No 290, 2004) and *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006). Horder also discusses some of the recommendations arising from the Commission’s separate project on participation in crime, insofar as these bear on the law of homicide: see *Participating in Crime* (Law Com No 305, 2007).

<sup>2</sup> Horder served as a Law Commissioner from 2005 to 2010. His term began after the publication of *Partial Defences to Murder*, but before the opening of the consultation that led to the more general report, *Murder, Manslaughter and Infanticide*. For the consultation paper, see Law Commission, *A New Homicide Act for England and Wales?* (Consultation Paper No 177, 2005).

3). I then conclude (in section 4) by considering the relationship between these substantive proposals and Horder's proposals for the process of homicide reform.

## 2. Horder's Architecture of Homicide

### A. The Proposed Three-Tier Structure

In line with common law tradition, contemporary English law recognizes two grades of homicide: murder and manslaughter. Murder, which carries a mandatory sentence of life imprisonment,<sup>3</sup> is defined relatively simply. A person, D, commits murder when D kills another person, V, and intends either to kill or to cause serious harm. Manslaughter, by contrast, has a variegated definition. In cases of 'voluntary' manslaughter, D has the required *mens rea* for murder, but receives mitigation through a partial defence (such as loss of control or diminished responsibility).<sup>4</sup> In cases of 'involuntary' manslaughter, D lacks the required *mens rea* for murder and is instead liable on one of two other grounds. First, D commits manslaughter if D causes V's death by performing an unlawful and dangerous act. Second, D commits manslaughter if D kills V recklessly or through gross negligence.<sup>5</sup>

Horder agrees with the Law Commission that this two-tier structure has come to bear an impossible amount of weight over time. He gives two principal reasons why. First, the definition of manslaughter is unacceptably broad. At one end of the spectrum, it includes highly culpable cases of 'mitigated murder'. At the other, it includes cases involving very low culpability: perhaps only mere negligence as to the occurrence of *some* harm.<sup>6</sup> Second, the *mens rea* of murder – and thus, the scope of the mandatory life sentence – has proved difficult to formulate satisfactorily. Judges have long regarded the 'malice aforethought' standard as intolerably vague. And yet attempts to specify more precise fault requirements seem inevitably to result in definitions that are intuitively both over- and under-inclusive.<sup>7</sup>

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<sup>3</sup> Murder (Abolition of Death Penalty) Act 1965 s 1(1).

<sup>4</sup> Coroners and Justice Act 2009 ss 52 (diminished responsibility) and 54-55 (loss of control).

<sup>5</sup> The definitions of the basic homicide offences are still governed entirely by the common law. See e.g. D Ormerod, *Smith and Hogan's Criminal Law*, 13<sup>th</sup> edn. (OUP, Oxford 2011) chs 14 and 15.

<sup>6</sup> HPLR 92.

<sup>7</sup> HPLR 92-93.

Horder further agrees with the Commission that a three-tier structure would be the best way of solving these problems. On the Commission's proposals, the third tier would have been created by dividing the offence of murder into two 'degrees'. Only first degree murder would have attracted a mandatory life sentence.<sup>8</sup> The Commission had initially proposed a very narrow definition of first degree murder, limited to intentional killings.<sup>9</sup> Consultees, however, were largely against this proposal. Even if intentional killing were to be the essence of first degree murder, at least some kinds of unintentional killing (it was argued) are just as culpable as this. The final proposals captured this idea by including within first degree murder cases where D intended to cause serious injury, and was also aware of a serious risk of death.<sup>10</sup>

Horder says little in *HPLR* about first degree murder. He is more interested in how other kinds of culpable killing are to be divided between second degree murder and manslaughter. As the 'middle tier' offence, second degree murder plays both an 'upgrading' and a 'downgrading' role, relative to the current structure. In two kinds of case, conduct that is currently classified as manslaughter would instead be 'upgraded' to second degree murder. First, the Commission recommended that cases involving partial defences should be reclassified as second degree murder. Its reasoning was that it is the mandatory life sentence, and not the label 'murder', that necessitates partial defences.<sup>11</sup> Second, some kinds of reckless killing would also be 'upgraded' from manslaughter. The Commission felt that reckless killing *simpliciter* should continue to fall outwith the definition of murder. It believed, however, that some forms of reckless killing are sufficiently culpable to warrant a murder conviction. It eventually proposed that second degree murder should encompass reckless killings coupled with intention to cause injury, or fear or risk of injury.<sup>12</sup>

The other proposed variety of second degree murder is killing with intent to cause serious injury (without awareness of a risk of death). Here, the second degree offence plays a 'downgrading' role. These cases currently fall within the definition of murder, and they should (the Commission argued) continue to be labelled as such. By itself, however, intention

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<sup>8</sup> See generally *Murder, Manslaughter and Infanticide* part 2.

<sup>9</sup> *A New Homicide Act for England and Wales?* 29.

<sup>10</sup> *Murder, Manslaughter and Infanticide* 29-30.

<sup>11</sup> *Ibid* 44, 50. Horder proposes substantial reforms to the partial defences, which I regrettably lack the space to discuss here: see generally *HPLR*, ch 8.

<sup>12</sup> *Murder, Manslaughter and Infanticide* 37-40; *HPLR* 98-101.

to cause serious injury is not as culpable as the forms of *mens rea* caught by first degree murder. These cases should therefore be re-classified as second degree murder, thus removing them from the scope of the mandatory sentence.<sup>13</sup>

The definitions of the involuntary forms of manslaughter were beyond the Commission's remit. Hence, it recommended only minor, clarificatory changes to these.<sup>14</sup> Horder, however, does recommend substantial changes to the law of manslaughter. In particular, he joins many others in criticizing the 'unlawful and dangerous act' form of the offence. Horder deems this a 'mongrel' crime whose modern definition obscures the distinct form of wrongdoing that it historically targeted. He argues that the 'pure' form of manslaughter involves death caused through an attack on V's physical integrity: that is, through conduct intended to cause physical harm of a certain degree of gravity.<sup>15</sup> One can contrast this with cases where the victim was put at risk, rather than attacked. Where endangerment of life is the (alleged) basis of liability, Horder argues that prosecutors should prefer the gross negligence form of the offence.<sup>16</sup>

## B. Structural Principles

Structuring homicide involves matching offence definitions to labels and sentences. On one level, then, the criteria for success in homicide reform are obvious: we must ensure that appropriate labels and sentences attach to the various kinds of culpable killing. By itself, however, this clearly doesn't take us very far. What we really need to know is rather: what makes a given label or sentence appropriate for a given type of killing?

Regrettably, *HPLR* does not address this question systematically. By reading the book closely, however, and in conjunction with Horder's wider body of work, one can reveal some answers.<sup>17</sup> In general, Horder believes that offence labels and sentences should primarily reflect *wrongdoing*. As he writes elsewhere:

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<sup>13</sup> *Murder, Manslaughter and Infanticide* 33-34; *HPLR* 97-98.

<sup>14</sup> *Murder, Manslaughter and Infanticide* 51.

<sup>15</sup> *HPLR* 140-143.

<sup>16</sup> *HPLR* 151-153.

<sup>17</sup> I will draw on the following sample here: J Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 OJLS 335; J Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759; J Horder, 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 LQR 95; J Horder, 'The Classification of Crimes and the Special Part of the Criminal Law' in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP, Oxford 2005).

Serious crimes against the person are sometimes known by a name that not only describes factually what the defendant has done, but also purports to capture the moral essence of the wrong involved. Such is the case with murder, rape, torture and (although more controversially) manslaughter... The law must try to fix on a definition of the crime that captures the moral essence of the wrong in question, by reference to the best moral conception of that essence in society as it is today.<sup>18</sup>

Horder concedes that this is an ideal vision: there are valid pragmatic concerns that should sometimes prevent its perfect realization. For example, there are reasons to define offences in ways that judges and juries can easily understand and apply, and that facilitate consistency in their decision-making. Promoting such virtues will sometimes require offences that do not perfectly reflect the full range of relevant moral distinctions. In the case of serious crimes like homicide, however, Horder argues that such concerns should be given relatively little weight. For him, justice requires primarily that the conviction and punishment imposed on offenders reflect the wrongs that they have committed.<sup>19</sup>

How should we understand the conception of 'wrongdoing' that Horder is relying upon here? Perhaps the best way to answer this question is to begin, as Horder does, with a theory of criminal wrongdoing that he clearly rejects. Both in *HPLR* and elsewhere, Horder argues strongly against subjectivist principles of criminal liability. In particular, he continues to criticize the correspondence principle: the (putative) principle stating that every *actus reus* element of a criminal offence must be accompanied by a corresponding *mens rea* requirement. This principle is thought to follow from a commitment to core subjectivist values, such as respect for individuals' moral autonomy and capacity to choose. As Andrew Ashworth explains:

Starting from respect for the moral autonomy of all individuals, subjectivists argue that criminal liability should not be imposed in respect of a given harm unless D intended to cause or knowingly risked causing that harm (the principle of *mens rea*). Similarly, D should be judged on the facts as he or she believed them to be (the belief

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<sup>18</sup> 'Rethinking Non-Fatal Offences against the Person' 335.

<sup>19</sup> Ibid 339-343.

principle). By respecting these principles, criminal liability is tied as closely as possible to what D intended, knew or believed when involved in the relevant behavior... Proper respect for these two principles therefore leads to a third, the principle of correspondence...<sup>20</sup>

Observing the correspondence principle would have significant implications for the law of homicide. Especially, there would be no liability for homicide without some *mens rea* as to death. This rules out constructive liability homicide offences: that is, offences requiring *mens rea* only as to some lesser harm than death. The correspondence principle would thus exclude both the 'intention to cause serious injury' form of second degree murder and Horder's 'pure' form of manslaughter by attack.

Horder argues that the correspondence principle lacks the historical, legal credibility that some subjectivists claim for it.<sup>21</sup> More significantly, however, he argues that it is morally unsound. Subjectivists seem to think it obvious that criminal liability for a given consequence (say, death) is unfair unless the actor had some *mens rea* – preferably, subjective *mens rea* – as to that consequence.<sup>22</sup> But this, Horder argues, presupposes a controversial view about how wrongdoing is structured. In fact, the presence of just *some* level of *mens rea* often suffices to render an action wrongful.<sup>23</sup> For Horder, indeed, this is the primary role of intention in criminal law.<sup>24</sup> By intending to cause harm *simpliciter*, defendants assume responsibility for the consequences that flow from their actions. Generally, criminal liability for those consequences is therefore warranted.<sup>25</sup>

Horder's version of the three-tier structure reflects this idea. The placement of killings within this structure depends on whether D has *attacked* V: that is, on whether D's actions were intended to cause harm. The presence of intention explains, for example, why there can be murder even in the absence of *mens rea* as to death. The wrong underlying second degree

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<sup>20</sup> A Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Criminal Law Review 232, 235-236.

<sup>21</sup> See generally 'Two Histories and Four Hidden Principles of *Mens Rea*'.

<sup>22</sup> See e.g. Ashworth, 'A Change of Normative Position'; A Ashworth, 'Taking the Consequences' in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (OUP, Oxford 1993); B Mitchell, 'In Defence of a Principle of Correspondence' [1999] Crim LR 195.

<sup>23</sup> 'Two Histories and Four Hidden Principles of *Mens Rea*' 102-103; 'A Critique of the Correspondence Principle in Criminal Law' 761.

<sup>24</sup> 'A Critique of the Correspondence Principle in Criminal Law' 762. See also J Horder, 'Intention in the Criminal Law – A Rejoinder' (1995) 58 MLR 678.

<sup>25</sup> 'A Critique of the Correspondence Principle in Criminal Law' 764.



murder is complete simply in virtue of the intention to cause serious injury.<sup>26</sup> Similarly, the presence of harmful intention explains why the ‘pure’ case of manslaughter is easily accommodated within the structure of homicide – perhaps more easily, even, than reckless or grossly negligent killings.<sup>27</sup> The precise content of the relevant intention makes a difference to grading in this case: death is too distant from mere injury to justify the label ‘murder’. But there is still an attack on the victim, which is sufficient to establish ‘basic’ liability for a homicide offence.<sup>28</sup>

*HPLR* also builds on Horder’s previous work by identifying a further factor that supports the three-tier structure: the value of physical integrity. It is significant that the ‘attack’ forms of homicide involve intention; yet it is also significant that they involve intention to cause a *particular kind* of injury. Horder argues that there is a value of physical integrity that is distinct from values such as personal space. Actors who interfere with others’ physical integrity are guilty of more than mere trespass to the person: they *violate* their victims.<sup>29</sup> Importantly, one’s life is a constituent part of one’s physical integrity. Hence, one might intend only to cause some physical injury; but if one in fact causes death, then one has still interfered with the same value that one attacked. Again, this helps to explain why homicide by attack can be more culpable even than reckless killing. In these cases, defendants attack the physical integrity of which their victim’s life is a constituent part.<sup>30</sup>

Finally, we should note the complex role that labelling plays in Horder’s account. As we have seen, Horder believes that constructive liability is generally justifiable: actors can legitimately be held liable for a given consequence on the basis of fault as to a less serious consequence. However, he is only a *moderate* constructivist: he does not believe that *any* level of fault legitimizes liability for *any* consequence. Sometimes, consequences occur that are so distant from those intended or anticipated by an actor that stigmatic offence labels would be unfair. This is so where the harm intended is of a different kind to that which occurs: for example, where property damage is intended rather than personal injury. But it can also

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<sup>26</sup> *HPLR* 97.

<sup>27</sup> *HPLR* 150-151.

<sup>28</sup> *HPLR* 146-148.

<sup>29</sup> *HPLR* ch 5. Horder’s idea of violative crime owes something to J Stanton-Ife, ‘Horrific Crime’ in RA Duff et al (eds), *The Boundaries of the Criminal Law* (OUP, Oxford 2010). Ultimately, however, Horder distinguishes his idea of the ‘violative’ from Stanton-Ife’s idea of the ‘horrific’: *HPLR* 153-154.

<sup>30</sup> *HPLR* 148. The idea of ‘violative’ crime also plays other roles in Horder’s view, which I will not discuss here: for example, it explains the limitations on consent as a defence to offences against the person (*HPLR* 141; 144-145) and the class of offences for which the public should be involved in the law reform process (*HPLR* 3).

be so where the harm caused is of a much higher degree than the harm intended.<sup>31</sup> Hence, whilst killings with intent to cause injury are properly treated as criminal homicides, they do not warrant the label ‘murder’. Only where *serious* injury is intended is there sufficient proportionality between the harm intended and the harm that occurs for this level of stigma to be justified.<sup>32</sup>

### 3. Evaluating Horder’s Architecture

Let us assume initially that Horder is correct about the basis for structuring criminal offences: that is, that distinctions between offences should primarily reflect distinctions amongst the wrongs that those offences target. Does this provide sound normative foundations for Horder’s proposed structure of homicide offences? What sorts of distinctions in ‘wrongness’ should concern us in the homicide context?

#### A. Grading and Culpability

To this latter question, the orthodox answer is that distinctions between homicide offences should aim primarily to track distinctions in *culpability*: that is, in how badly the action concerned reflects on the offender. Any proposed ‘homicide ladder’ must ensure, insofar as is practicable, that equivalently culpable killings receive equivalent treatment.<sup>33</sup> This is a natural ideal for any regime of offences that is structured solely by reference to *mens rea*. If the *actus reus* of offences – in this case, causing another’s death – is held constant, then different *mens rea* standards inevitably reflect at least partial distinctions in (*prima facie*)

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<sup>31</sup> ‘Two Histories and Four Hidden Principles of *Mens Rea*’ 113-118; ‘A Critique of the Correspondence Principle in Criminal Law’ 769-770. Compare the similar arguments that Horder runs in the context of transferred malice in murder: *HPLR* ch 7.

<sup>32</sup> *HPLR* 97-98. Compare ‘Two Histories and Four Hidden Principles of *Mens Rea*’ 105-107.

<sup>33</sup> This was certainly the Law Commission’s view: see *Murder, Manslaughter and Infanticide* 22, 26-27. This general approach was endorsed by the majority of commentators on the Commission’s proposals – although there was, unsurprisingly, disagreement about what sorts of killing should be placed on each ‘rung’ of the ladder. See e.g. A Ashworth, ‘Principles, Pragmatism and the Law Commission’s Proposals on Homicide Law Reform’ [2007] *Crim LR* 333, 334; J Rogers, ‘The Law Commission’s Proposed Restructuring of Homicide’ (2006) 70 *Journal of Criminal Law* 223, 226-228; V Tadros, ‘The Homicide Ladder’ (2006) 69 *MLR* 601, 602.

culpability.<sup>34</sup> The task of law reformers, the orthodox view holds, is simply to ensure that these standards identify types of killing whose culpability is approximately the same.

So far as this goes, advocates of the correspondence principle will doubtless concur. For subjectivists more than anyone, culpability should be decisive in structuring criminal offences – and generally speaking, *mens rea* is a marker of culpability.<sup>35</sup> The principle rather concerns the *types* of *mens rea* that offences should require. By definition, homicide offences are offences of causing death. *Mens rea*, however, says nothing about culpability *for a death* unless it is *mens rea as to death*. Thus (the argument goes), constructive liability in homicide is unacceptable. The ‘intent to cause serious injury’ form of second degree murder and the ‘pure’ form of manslaughter by attack may catch culpable conduct. But they do not catch culpable *killings*. Hence, we ought to reject them.

Horder is correct to resist this line of argument. One may agree with subjectivists that the criminal law ought only to target conduct that is at least *prima facie* culpable. One may further agree that the law ought not to label people in a given way unless that label is warranted. But to get from these premises to the correspondence principle requires considerable leaps of logic. Advocates of this principle do not deny – indeed, they presuppose – that actors may sometimes be said to cause death even when they lack *mens rea* as to death.<sup>36</sup> But if this is true, then how could it be unfair to label such actors as killers? Why should the law require anything in addition to people actually *being* killers, to warrant labelling them as such?<sup>37</sup>

Advocates of the correspondence principle might think that they have easy answers to these questions. In using labels like ‘murder’ and ‘manslaughter’ (the argument might go), the law does not just label offenders as killers. It labels them as *culpable killers*. This is because

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<sup>34</sup> I use this qualified language to reflect the fact that culpability depends on factors besides *mens rea* – including defences that may wholly or partially defeat *prima facie* culpability.

<sup>35</sup> For a theory of criminal law that takes this subjectivist thought to its logical extreme – making liability depend solely on culpability, and culpability solely on *mens rea* – see generally L Alexander and K Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP, Cambridge 2009).

<sup>36</sup> It is notable that most subjectivists retain some such ‘objective’ commitments. Despite their claims, few are content to argue that choice should really be the *sole* determinant of criminal liability. For discussion, see e.g. RA Duff, ‘Subjectivism, Objectivism and Criminal Attempts’ in AP Simester and ATH Smith (eds), *Harm and Culpability* (OUP, Oxford 1996). The notable exception to the general rule is Alexander and Ferzan, *Crime and Culpability* (ibid).

<sup>37</sup> For my own preliminary attempts to tackle these questions – and for a defence of the view that they are the correct questions to be asking in this context – see generally A Cornford, ‘Resultant Luck and Criminal Liability’ in RA Duff et al (eds), *The Structures of Criminal Law* (OUP, Oxford 2011).

these labels imply culpability as to death: even the less stigmatic label ‘manslaughter’, it might be thought, implies at least that the killing concerned was negligent.<sup>38</sup>

This, however, is just argument by assertion. The label ‘manslaughter’ is doubtless condemnatory: it implies *some* culpability. But we have no particular reason to suppose that it implies culpability as to death. How, indeed, could we even determine whether this were true? I do not mean to suggest that this question does not have a satisfactory answer; the point at this stage is rather that advocates of the correspondence principle need to supply one. Just because a label attributes a result to an actor, it does not follow that it also implies culpability as to that result.

These remarks might seem sufficient to vindicate constructive liability in homicide. Since homicide offences share a common *actus reus* of causing death, they fall to be distinguished primarily on culpability grounds. Moreover, culpability in relation to death is not required for liability. Thus, all that Horder would need to show is that his proposed three-tier structure groups together homicides whose culpability is approximately equivalent. For instance, perhaps killings with intent to cause injury are approximately as culpable as grossly negligent killings. And perhaps killings with intent to cause serious injury are approximately as culpable as the more serious reckless killings. Again, I do not necessarily say that these claims are true. But the orthodox approach at least provides a plausible form in which Horder might have defended his view systematically.

## B. Wrongdoing beyond Culpability

It is perhaps surprising to find, then, that Horder rejects the orthodox view. For Horder, the role of *mens rea* in criminal offences is not just to identify culpability: rather, *mens rea* ‘can be partly constitutive of the wrongdoing in some crimes’.<sup>39</sup> Intention especially is ‘rarely... a mere “fault element” in the criminal law’.<sup>40</sup> Rather, ‘[i]ts main role is in changing the normative significance of conduct’.<sup>41</sup> When combined with the claim that wrongdoing should

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<sup>38</sup> See e.g. Ashworth, ‘Taking the Consequences’ at 118: ‘Subjectivists would argue that this [constructive liability manslaughter] is contrary to principle. E intended only a fairly minor battery, and it is unfair to impose the “manslaughter” label when the unlucky result was unforeseen and unforeseeable. E does not deserve such a heavily condemnatory label when his culpability was much more minor.’

<sup>39</sup> ‘A Critique of the Correspondence Principle in Criminal Law’ 761.

<sup>40</sup> Ibid 762.

<sup>41</sup> Ibid 762.

structure criminal offences, this view has implications for homicide reform. If killers with different *mens rea* sometimes commit different *wrongs*, then the level of culpability indicated by that *mens rea* cannot be the sole decisive factor in structuring homicide offences.

Before examining this idea, we should note a general reason for scepticism about the role of wrongdoing in the structure of homicide. When separated from culpability, the term ‘wrongdoing’ presumably refers to the permissibility of action: ‘wrongs’ are actions that one ought not to perform, or that one has a duty not to perform.<sup>42</sup> Different wrongs, in this sense, are actions that are distinct *qua* impermissible actions.<sup>43</sup> In some areas of the criminal law, it is likely that distinctions of this sort should play a significant role in structuring offences. For instance, some regimes (such as offences against the person in English law) are structured by reference to different types and degrees of injury.<sup>44</sup> Others, meanwhile (such as property offences and sexual offences) pick out different ways of interfering with interests.<sup>45</sup> By definition, however, homicide is unlike these regimes. As we have already seen, homicide offences are defined in terms of a single type of injury and a single, broad ‘mode of responsibility’: causing another’s death.<sup>46</sup> Since Horder’s proposals would not change the *actus reus* of homicide, his range of potential appeals to wrongdoing in this context is limited from the outset.

Still, the possibility remains that *mens rea* might influence the type of impermissible action that killers perform. Specifically, if D kills V by attacking her, then perhaps the wrong that D does is different to simply ‘causing V’s death’ or ‘endangering V’s life’. Horder lends support to this interpretation elsewhere in his work. He suggests that we have reasons not to *intend* to harm others, which are distinct from our reasons not to *cause* harm to them.<sup>47</sup> Such

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<sup>42</sup> I gloss over many complications here about the relationships between duties, permissibility and culpability. For discussion of some of these, see J Gardner, ‘Wrongs and Faults’ in AP Simester (ed), *Appraising Strict Liability* (OUP, Oxford 2005).

<sup>43</sup> There is a problem here of what we might call ‘norm individuation’. How are we to distinguish amongst norms – and hence amongst wrongs *qua* impermissible actions? I leave this issue aside here. For some remarks of Horder’s on the topic, see J Horder, ‘Crimes of Ulterior Intent’ in S Shute and AP Simester (eds), *Harm and Culpability* (OUP, Oxford 1996) 170-171.

<sup>44</sup> See e.g. Horder, ‘Rethinking Non-Fatal Offences against the Person’; J Gardner, ‘Rationality and the Rule of Law in Offences against the Person’ in his *Offences and Defences* (OUP, Oxford 2007).

<sup>45</sup> On property offences, see e.g. AP Simester and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP, Oxford 2005) and S Shute and J Horder, ‘Thieving and Deceiving: What is the Difference?’ (1993) 56 MLR 548. On sexual offences, see e.g. J Temkin, *Rape and the Legal Process*, 2nd edn (OUP, Oxford 2002) ch 3.

<sup>46</sup> ‘Mode of responsibility’ is Horder’s term: see generally ‘Rethinking Non-Fatal Offences against the Person’.

<sup>47</sup> See generally ‘The Classification of Crimes and the Special Part of the Criminal Law’, particularly at 32-37.

a view might seem at odds with the traditional separation of *actus reus* and *mens rea* in criminal law. But it is by no means absurd: whilst the issue is controversial amongst moral philosophers, it is at least plausible that intention can influence the permissibility of action. For instance, there are well-known cases in which it seems more difficult to justify harms that are intended than those that are merely foreseen.<sup>48</sup>

This interpretation of Horder's view is difficult to reconcile, however, with the structure of homicide that he defends in *HPLR*. Certainly, the distinction between attack and endangerment plays an important threshold role in this structure: only in attack cases can one become constructively liable for a death. Beyond this, though, the distinction seemingly cannot play a supporting role in the three-tier structure. This is because it cuts across the murder / manslaughter divide.<sup>49</sup> As we have seen, Horder's 'pure' manslaughter is an offence of attacking. And although *some* kind of hostile intention is necessary for a murder conviction, second degree murder includes cases where recklessness as to death is the principal basis for liability. Again, the orthodox view seems a better explanation of the distinctions between these proposed offences: what matters is the level of culpability that they require.

Moreover, wrongdoing does not provide a plausible explanation even for the threshold role of *mens rea* in Horder's preferred structure. Recall that, for Horder, a fatal attack should be manslaughter only where the level of injury intended amounts to a violation of physical integrity. Yet surely personal attacks remain (*prima facie*) wrongful even where a lesser level of injury than this is intended? Perhaps we could instead interpret the claim as one about *type* of wrongness. Only where a 'violative' injury is intended (the argument might go) is the wrongful action a *killing*. But this interpretation fares no better. Imagine, for example, that D grabs V's shoulder, causing V (who is extremely sensitive) to die promptly from shock. Clearly, no violation of V is intended in this case. Yet at least as the law understands causation, D has surely still caused V's death.<sup>50</sup>

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<sup>48</sup> The most comprehensive treatment of this issue in the philosophical literature is TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press, Cambridge, MA 2008). For further discussion of attack and endangerment as distinct types of criminal wrong, see RA Duff, *Answering for Crime* (Hart, Oxford 2007) ch 7.

<sup>49</sup> Compare William Wilson, who has argued that the murder / manslaughter distinction reflects the attack / endangerment distinction: see e.g. 'The Structure of Criminal Homicide' [2006] Crim LR 471; 'What's Wrong with Murder?' (2007) 1 Criminal Law and Philosophy 157. Even understood as a charitable reconstruction of the current law, Wilson's view is unpersuasive. As Horder highlights, manslaughter includes cases of causing death by attack. And since intention includes foresight (*R v Woollin* [1999] 1 AC 82), murder also includes cases of endangerment of life.

<sup>50</sup> See e.g. *Bird v HM Advocate* 1952 JC 23.

One might respond, of course, that these are not the only senses of wrongdoing in which the law might be interested. Admittedly, actors may sometimes be said to cause death even where the threshold *mens rea* conditions of homicide are not met. Perhaps, though, such actors do not commit *the wrongs of murder or manslaughter*. Without more, however, this is essentially an argument from offence labelling – similar to possible subjectivist arguments from labelling, considered above. Thus, it is vulnerable to similar objections. First, it is not obvious how we are to determine whether (say) the word ‘manslaughter’ actually does imply intention to cause injury. And second, even if we granted that it does imply this, the truth disclosed by this would only be a trivial one. Intention would affect the ‘wrong’ in homicide only in the hollow sense that the law’s name for a particular type of homicide happens to pick out intention. It would not yet follow that this feature has independent moral significance, such that legal language *ought* to pick it out.

### C. Punishment and Labelling

All of this suggests that ‘wrongdoing’ does not provide solid foundations for the three-tier structure of homicide defended in *HPLR*. There is, however, another way in which we might interpret Horder’s view. Homicide offences, one might admit, concern essentially the same ‘wrong’: *viz.*, causing another’s death. Nevertheless, it does not follow that the *mens rea* elements of these offences function only as markers of culpability. They might also function as conditions of the *liabilities* that homicide offences entail. Again, Horder’s remarks elsewhere suggest that he might endorse this interpretation:

[If] my unlawful act is meant to wrong V, its relevance is normative... Its deliberateness changes my relationship with the risk of adverse consequences stemming therefrom, for which I may now be blamed and held criminally responsible, irrespective of their reasonable foreseeability.<sup>51</sup>

Two kinds of ‘blame’ and ‘responsibility’ are at stake in criminal cases: first, liability to a given level of punishment, and second, liability to a stigmatic offence label. Intention, Horder might

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<sup>51</sup> ‘A Critique of the Correspondence Principle in Criminal Law’ 764.

argue, influences whether it is appropriate for a given outcome (in this case, death) to affect these forms of liability. Even when an actor has acted culpably and caused death in doing so, perhaps death should not influence that actor's liabilities unless further conditions are satisfied.

Note once again the role that labelling must be playing in this interpretation of Horder's view. As we have seen, Horder advocates only a moderate form of constructivism. It may be that hostile intent generally legitimizes constructive liability: that is, it may render it legitimate for the consequences of one's actions to influence one's conviction and punishment. But the scope of such liability is limited by concerns like labelling. This is why, for example, killings with intent to cause (mere) injury may constitute manslaughter but not murder. Once again, however, this latter part of the argument is essentially an argument from the stigma attached to the label 'murder'. And we have already highlighted the unanswered questions that such arguments raise. For instance, why should we think that the stigma implied by the label 'murder' warrants a *mens rea* of at least intention to cause serious injury?

Unanswered questions similarly remain about the threshold of homicide liability on this interpretation of Horder's view. Ordinarily (the argument goes), the fact that D caused V's death should not affect D's criminal liability. In the absence of *mens rea* as to death, intention to cause injury is necessary for this. As others have shown, however, the idea that intention changes one's 'normative position' in this way is mysterious.<sup>52</sup> At best, it seems arbitrary. Why should only intention to cause injury suffice for this purpose? Why not (say) foresight of or recklessness as to injury? One might respond: only actors who intend to cause harm have chosen to cause harm. But this response adds no new information. Without a supporting account of why (only) choosing to cause harm changes one's position in this way, this argument simply begs the question.<sup>53</sup>

Horder, of course, will be well aware of such objections. It is in response to these, perhaps, that he has introduced in *HPLR* the idea of homicide as a 'violative' crime. As we saw,

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<sup>52</sup> See especially Ashworth, 'A Change of Normative Position'. This influential idea is attributable originally to Gardner, 'Rationality and the Rule of Law in Offences against the Person' 40. Gardner, however, has subsequently clarified that he did not intend the idea as a justification of constructive liability: rather, he intended it as an analysis of 'the law's own moral outlook'. See 'Reply to Critics' in his *Offences and Defences*, 246-247.

<sup>53</sup> Ashworth (ibid) 255-256. For an attempt to explain an attacker's change of normative position that avoids begging the question in this way, see K Simons, 'Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?' (2012) 32 OJLS 445.



violative crimes are those that involve interference with others' physical integrity. People's lives are a constituent part of their physical integrity; thus, death is ultimately a setback to the same interest as lesser violations. Those who intend such lesser violations can correspondingly have no complaint if they become criminally liable for causing death – that is, if this influences how they are labelled and sentenced. In this sense, the choice to attack another can sometimes change one's normative position in relation to the fatal consequences of that attack.

For the sake of argument, let us assume that physical integrity may be identified as a distinct value in the way that Horder proposes. Even if so, it is difficult to see how this is relevant to constructive liability in homicide. The law of homicide is not concerned with violations of physical integrity, *under that description*. Rather, as Horder himself puts it, it is the law of 'life preservation'.<sup>54</sup> Homicides are, by definition, distinguished legally from other, non-fatal offences against the person. To put this more precisely: the law constructs homicides not as interferences with life *qua* constituent component of physical integrity, but as interferences with life *qua* life. It constructs life, that is, as a significantly distinct value from physical integrity. Correspondingly, when persons are held liable for causing death, they are not held liable merely for a different form of 'violative' injury to the kind that they intended. They are rather held liable for the death itself. It remains obscure how intending injury could change one's normative position, such that this judgement is warranted.

To summarize, it is difficult to make sense of Horder's preferred three-tier structure in terms of either the wrongs that it targets or the liabilities that it entails. A stronger defence of this structure, I suggest, would proceed from the simpler, orthodox premise: the law of homicide should aim to ensure that equivalently culpable killings receive equivalent treatment. This, however, is not to advocate subjectivist principles of liability in homicide law. Horder's criticisms of these principles are often the correct ones; the problem is that he ultimately leaves many of the same questions unanswered as his subjectivist opponents. For example: if D has actually killed V, then why should there be constraints on the law's treating D as a killer? Why should homicide liability require particular sorts of *mens rea*, other than to ensure culpability? And if we are to premise our arguments on claims about labelling, how

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<sup>54</sup> HPLR 111-112.

can these be verified? Neither subjectivism nor moderate constructivism have, in their present forms, the resources to answer these questions satisfactorily.

#### 4. Legitimacy and Labelling

Horder's substantive account of the proper structure of homicide forms an important part of *HPLR*. As I indicated at the outset, however, this is not just a book about the substantive criminal law; it is also a book about criminal law *reform*. Indeed, the book's first chapter – which accounts for around a quarter of its overall length – is devoted entirely to this topic. Ostensibly, this chapter is a historical account of homicide reform (and, indeed, criminal law reform more generally) in England over the past two centuries. But by Horder's own admission, the purpose of the chapter is not simply to tell this story for its own sake. Rather, Horder wants us to learn a lesson from his narrative: that ordinary citizens have been systematically excluded from the homicide reform process, and that this urgently needs to be changed.<sup>55</sup>

Horder's historical account of this 'legitimacy gap' in homicide reform is interesting in itself. More interesting for our purposes, however, is his proposed solution to the problem. Horder argues that ordinary citizens should be given a formal role in the law reform process – not just for homicide, but also for other violative crimes.<sup>56</sup> He proposes that any matter of principle – that is, 'any matter... that does not depend solely on empirical evidence, or on expert judgement' – should be regarded as the business primarily of the general public.<sup>57</sup> Citizens' opinions should be ascertained through properly designed and systematic public opinion research. Moreover, this project should be ongoing, with the law being subject to periodic review.<sup>58</sup> Corresponding to this, academic lawyers should take on a new role in the law reform process. Instead of seeing themselves as the guardians of 'principle', academics should aim primarily to educate the public about relevant matters.<sup>59</sup> Indeed, Horder argues

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<sup>55</sup> *HPLR* vii.

<sup>56</sup> *HPLR* 3-6.

<sup>57</sup> *HPLR* 58.

<sup>58</sup> *HPLR* 60-64.

<sup>59</sup> *HPLR* 29-32.

that this is a necessary corollary of reliance on public opinion research: we must ensure that the opinions on which the law relies are as well informed as possible.<sup>60</sup>

A striking thing about this proposal is just how uncomfortably it appears to sit with the remainder of *HPLR*. Horder gives an impassioned defence of his new vision of criminal law reform – and especially of the place of academic lawyers within it. But this seems to be forgotten by the beginning of chapter three. The substantive recommendations in the second and third parts of the book are not supported by the kind of systematic public opinion research that chapter one advocates. Indeed, as we have seen, they are based on the very kind of ‘argument from principle’ that the first chapter purports to discourage. Of course, Horder’s principles are not the principles of the subjectivists whom he criticizes throughout the book – including in its first chapter.<sup>61</sup> But by Horder’s own lights, this is beside the point: values ‘cannot and should not gain acceptance simply because scholars earnestly and passionately believe them to be true’.<sup>62</sup>

Is it possible to reconcile these two aspects of *HPLR*? Can one consistently be committed both to ‘principled’ normative argument about the criminal law and to increased legitimacy in criminal law reform? To answer this question, it would help to be clearer about precisely why Horder advocates more direct popular involvement in the reform process. Frustratingly, Horder again declines to discuss this issue explicitly in the book. At times, however, he seems to endorse the view that legislators simply have a duty to defer to the popular will in this way – or at least, that there is strong inherent value in such deference. This seems, for instance, to motivate his invocation of Antony Duff’s view of the criminal law as a ‘public’ enterprise. According to this view, criminal wrongs are those wrongs which are our collective business as members of a political community.<sup>63</sup> Arguably, if the criminal law ‘belongs’ to citizens in this sense, then it is fitting that they should have at least some say in its substantive content.<sup>64</sup>

One can easily anticipate a sceptical response to this line of argument, however. Imagine that, if ordinary citizens were to become directly involved in the homicide reform

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<sup>60</sup> *HPLR* 57.

<sup>61</sup> Horder’s criticisms in this chapter focus on subjectivists’ rhetorical strategies, rather than their substantive principles: *HPLR* 18-29; 35-46.

<sup>62</sup> *HPLR* 32.

<sup>63</sup> See generally Duff, *Answering for Crime*; SE Marshall and RA Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 1.

<sup>64</sup> *HPLR* 4.

process, the result would be a much worse law of homicide. In that case, it is difficult to believe that this involvement would be inherently valuable or worthy of legislative deference. Even if it were inherently valuable, it is difficult to believe that its value could outweigh the *disvalue* associated with a much worse law of homicide. Conversely, one might doubt that we should automatically be sceptical about the role of legal academics and professionals in the reform process. Imagine that reform led by these groups would tend to produce the best law of homicide. In that case, we would seem to have a strong *pro tanto* case in favour of such reform.

These responses raise deep questions about democracy and its value – questions lying far beyond the scope of an article on the law of homicide. For our purposes, it will suffice to note that these responses are not necessarily decisive against Horder's proposals for increased public involvement in law reform. For such involvement may yet have considerable *instrumental* value. To list just a few possible examples: it would tend to make cynical, selective or false appeals to public opinion in law reform debates more difficult. It might help to promote at least a sense of ownership of the law: citizens will be more likely to regard the law as morally credible, and thus to obey it on those occasions when they disagree with it. Perhaps most significantly, many of the matters at issue in criminal law reform debates will be objects of profound disagreement. In the absence of an agreed 'moral truth' about such matters, public opinion might at least provide a serviceable substitute for this.<sup>65</sup>

In the space that remains, I will explore just one way in which a law of homicide informed by public opinion research might help to promote such values. This is through the role that such research might play in offence labelling. As we have seen, discussions about the proper structure of homicide law are complicated by its use of labels like 'murder' and 'manslaughter'. The complications arise from two qualities that these terms possess: they are at once stigmatic in nature and uncertain in meaning. If the law is to employ such labels, then it is important that its offence definitions should accurately reflect them. It is important, that is, that the conduct caught by the relevant offences should warrant the stigma attached to the relevant labels. Yet given their uncertainty, this raises several difficult questions. Most importantly: how are we to determine precisely what stigma attaches to the words 'murder'

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<sup>65</sup> Paul Robinson has been the most vocal proponent of a criminal law informed by community moral judgements and the benefits that this would yield. See, most recently, PH Robinson, *Intuitions of Justice and the Utility of Desert* (OUP, Oxford 2013) part II.

and ‘manslaughter’? What do these labels imply about the behaviour that they are used to describe?

These questions lack obvious answers. Hence, one might come to doubt that we should continue to use labels like ‘murder’ and ‘manslaughter’ in structuring homicide law. We could instead investigate alternative approaches. At one extreme, we might abandon grades of homicide altogether in favour of a single offence. This offence need not carry any label besides ‘homicide’ or ‘unlawful killing’. We could then find other ways to accommodate the concerns that motivate offence grading: for example, introducing discretionary sentencing for all homicide cases.<sup>66</sup>

Perhaps, however, this proposal is too reductive. Whilst we have reasons for caution about particular *kinds* of offence label, we should not jump to the conclusion that labelling is generally unimportant. Perhaps we could pursue the goals of fair labelling in homicide in a less troublesome way: say, by using blander terms that have clear and settled meanings outside of legal discourse. For instance, we might create separate offences of ‘intentional killing’, ‘grossly negligent killing’, ‘causing death by assault’ and so forth.<sup>67</sup> Alternatively, if this strategy proved to yield too many distinct offences, we might revert to the orthodox strategy: grouping homicides by approximate equivalence of culpability. We could simply label the resulting offences in a different way: say, as first, second and third degree homicide.

Would we lose anything of value if we were to replace the labels ‘murder’ and ‘manslaughter’ with blander labels like these? It is possible, I think, that we would lose something of at least modest value. By abandoning the labels ‘murder’ and ‘manslaughter’, the law would lose the moral authority and resonance that these terms have acquired over time.<sup>68</sup> This moral resonance consists partly in the stigmatic nature of these labels. A conviction for ‘murder’ carries a level of stigma that (we may suppose) would not initially attach to a conviction for ‘homicide I’. Perhaps more importantly, though, it is also possible

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<sup>66</sup> A proposal most famously made by Lord Kilbrandon in *Hyam v DPP* [1975] AC 55, 98. For the Law Commission’s dismissal of proposals of this kind, see *Murder, Manslaughter and Infanticide* 22. Besides the labelling concerns considered here, a single offence would also raise questions about the proper division of labour between judges and juries in homicide cases.

<sup>67</sup> For proposals of this kind (focusing particularly on the conduct currently falling within the offence of manslaughter), see e.g. CMV Clarkson, ‘Context and Culpability in Involuntary Manslaughter: Principle or Instinct?’ in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (OUP, Oxford 2000); CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate, Aldershot 2008).

<sup>68</sup> The ‘moral and social significance’ of these terms was the Law Commission’s principal reason for retaining them: *ibid* 22.

that these labels play a legitimizing role in criminal law. By using terms that have become significant in community moral discourse, the law can do something to align itself with that community's moral judgements. As we have seen, there are at least instrumental benefits that arguably follow from this.<sup>69</sup>

This hypothesis, if accepted, creates a problem for law reformers. We might have a good *pro tanto* case for retaining our current language of homicide. Yet as we have repeatedly seen, we also have a *pro tanto* case for avoiding terms like 'murder' and 'manslaughter', because their precise implications are uncertain. How, if at all, can we resolve this conflict? To answer this question, we need to know why the implications of offence labels should concern us in the first instance. Again, this is not an entirely straightforward matter: offence labels have a number of practical implications, which are important for different and sometimes conflicting purposes.<sup>70</sup> The most significant of these, though, are the implications of labels for the offenders who are subject to them. It is important that people should draw correct inferences about offenders and their actions from the labels that their offences carry.

Once one appreciates this, however, one must accept that claims about the stigma attached to offence labels are essentially empirical claims. The inferences that the public will draw from a given label depend on how that label is understood within public discourse; thus, the stigma attached to offence labels is a product of how the public understand them. This does not present special problems when the label concerned uses words that are commonly employed outside of legal discourse, and that have a relatively clear and settled meaning. In such cases, conceptual analysis will perhaps provide sufficient tools for ensuring fair labelling. But where the terms used lack a clear, settled usage outside of the law – as with 'murder' or 'manslaughter' – matters are different.<sup>71</sup> Since it is difficult to know how these terms are understood within public discourse, it is difficult to be sure just how stigmatic they are. Claims

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<sup>69</sup> For further development of this line of argument, see V Tadros, 'Fair Labelling and Social Solidarity' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP, Oxford 2012).

<sup>70</sup> For a detailed account of the importance of offence labels, see J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217.

<sup>71</sup> The uncertainty of such labels is, of course, a matter of degree. 'Murder', for instance, is more frequently used outside of the legal realm than 'manslaughter', and arguably has at least a core usage that is clearer and more settled. The point here is that, as the history of the case law on murder amply demonstrates, there is nevertheless significant uncertainty about the meaning of this term. Hence, we will struggle to construct an accurate account of how the public understand it without assistance from empirical research. Doubtless there are other traditional offence labels – perhaps even with clearer extra-legal uses than 'murder' – for which the same holds true to an extent.

about the stigma attached to such terms should thus be treated as empirical claims, and tested accordingly.<sup>72</sup>

This has implications for, *inter alia*, Horder's own views about the structure of homicide. Recall that, for Horder, labelling concerns provide a limit on constructive liability: they explain why killers who intend only to cause injury may not be liable for *murder*, even though they may be liable for a homicide offence. Since this argument is premised on a claim about the stigma attached to the label 'murder', its success depends upon empirical support for this claim.

Here, then, is at least one way in which we might integrate public opinion research into normative arguments about the structure of homicide. Because of their currency in community moral discourse, we have a *pro tanto* case for retaining labels like 'murder' in the criminal law. But this case is successful only to the extent that the law's use of these terms matches their use in community discourse. In order to determine this, empirical research into public understanding of these terms is necessary. Admittedly, this kind of public opinion research would be subtly different to the kind that Horder advocates. It would aim primarily to ascertain public opinion about existing labels, rather than opinion about how the law *should* be structured. Nevertheless, it could probably still achieve much of what Horder wants public opinion research to achieve. If the law's use of labels were to accord with public understanding of those labels, then this would, of itself, help to lend legitimacy to the law.<sup>73</sup>

There might, of course, turn out to be problems with this approach. If nothing else, the very uncertainty of the terms 'murder' and 'manslaughter' might create practical issues. We might find, for example, that people have no specific ideas about the meaning of these terms – or even if they do, that they disagree profoundly about them.<sup>74</sup> Alternatively, and perhaps more worryingly, we might find opinions that would create problems for the law if implemented. For example, we might find that popular judgement attaches significance to factors that the law has traditionally regarded as irrelevant: such as the killer's motive, the

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<sup>72</sup> So far as I am aware, there has not previously been empirical research conducted with this precise aim in mind. However, research has examined public knowledge and opinion on various matters relating to law and sentencing in homicide cases. Studies more directly addressing labelling issues could perhaps build on such previous work. For a recent, comprehensive discussion, see B Mitchell and JV Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart, Oxford 2012), particularly chs 5-7.

<sup>73</sup> Compare Tadros, 'Fair Labelling and Social Solidarity' 75.

<sup>74</sup> This seems especially likely to be true of manslaughter: see B Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 *British Journal of Criminology* 453, 466.

factual circumstances of the killing, or the identity of the victim.<sup>75</sup> To the extent that the law has good reason to avoid referring to such factors, this would create further dilemmas for legislators.

Such problems, however, are probably unavoidable as costs of a commitment to taking public opinion seriously. If we truly believe that the law's traditional labels have a value that is worth preserving, then compromises between this and other values will inevitably be necessary. For instance, say that public understanding of the meaning of 'murder' turns out to accord a significant role to the defendant's motive. Should motive therefore be incorporated into the definition of murder? The answer to this question depends on the strength of the reasons that support the traditional exclusion of motives from offence definitions.<sup>76</sup> These might be sufficiently strong to outweigh the benefits of a definition of murder that accords with public opinion. In this case, legislators should decline to follow public opinion, despite the general instrumental value of doing so.

Given these potential issues, however, one might still wonder whether this approach would ultimately prove more trouble than it is worth. Would it not be better to construct offence definitions that reflect independently significant factors? In that case, could we not achieve accordance with public understanding through (say) better education about offence definitions? Perhaps we could proceed in this way. If we were successful, then the resulting labels would, *ex hypothesi*, be fair: public understanding would reflect the relevant offence definitions. Yet on the account offered here, this approach would also be self-defeating. If our only goal is to achieve congruence between definitions, labels and public understanding, then we have little reason to retain the labels 'murder' and 'manslaughter'. For all their blandness, labels like 'intentional killing' and 'homicide' would perform better in the role that we would be assigning them. By contrast, our reasons to retain the traditional language of homicide relate mainly to the moral resonance (if any) that it has acquired over time. If we were unwilling to draw on this resource in re-structuring the law of homicide, then we would probably be better off rid of these distracting and obfuscatory terms.

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<sup>75</sup> Again, the available evidence suggests that this is likely: *ibid*, 463.

<sup>76</sup> On this issue, see e.g. RA Duff, 'Principle and Contradiction in the Criminal Law: Motives and Criminal Liability' in RA Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (CUP, Cambridge 1998).



## 5. Concluding Remarks

Review articles inevitably focus on disagreements between author and reviewer. In closing, then, I should say that *HPLR* is, in many respects, an impressive achievement. Horder engages his diverse subject matter in a characteristically formidable level of doctrinal, historical and philosophical detail – a level that cannot adequately be represented in a single article. Nothing that I have said here should cast doubt on the value of engaging with this book for those with interests in homicide law and its reform.

Still, this value would have been further enhanced by a normative framework with which to make sense of the book's rich detail. Readers would have benefited greatly from a clear account of the principles and values that Horder believes should guide homicide reform. In this article, I have drawn on Horder's previous work in an attempt to construct such an account. But I have also argued that this endeavour does not yield sound normative foundations for his proposals. Ultimately, Horder leaves too many foundational questions without satisfactory answers: about the justification and limits of constructive liability; about offence labelling; and about the value of direct popular involvement in the law reform process. Whilst the proposals defended in *HPLR* may yet have merit, a persuasive case for them therefore remains to be made.